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SHENCOURT SDN BHD v. SHENCOURT PROPERTIES SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
ZABARIAH MOHD YUSOF JCA
B RHODZARIAH BUJANG JCA
[CIVIL APPEAL NO: W-02(IM)-417-02-2018]
18 JANUARY 2019

C ***COMPANY LAW:*** *Liquidators – Removal – Application for removal of joint liquidators refused – Appeal against – Whether joint liquidators acted in manner contrary to interests of liquidation – Whether joint liquidators placed primary assets of company at risk – Whether there was personal conflict between joint liquidators – Whether liquidators failed to act jointly – Failure of joint liquidators to take reasonable steps to complete liquidation process in orderly manner – Whether joint* D *liquidators ought to be removed – Whether official receiver ought to be appointed to take conduct of liquidation process – Companies Act 2016, s. 482(b) – Companies (Winding-up) Rules 1972, r. 63*

This was the appellant/intervener's ('appellant') appeal against the decision of the High Court which had refused the application for the removal of joint E liquidators. The prayer in the notice before the High Court, *inter alia,* was that (i) Ricky Thong Yew Fook ('Ricky Thong'), one of the joint liquidators of Shencourt Properties (In Liquidation), the respondent company ('company'), be forthwith removed as joint liquidator of the company pursuant to s. 482(b) of the Companies Act 2016 ('Companies Act'); (ii) that F Dato Narendra Kumar Jasani ('Dato Narendra'), one of the joint liquidators of the company be forthwith removed as joint liquidator of the company pursuant to s. 482(b) of the Companies Act; and (iii) that the official receiver be appointed as liquidator of the respondent company in place of the said Ricky Thong and Dato Narendra. The brief grounds for removal were, *inter* G *alia*, that the joint liquidators had either individually and/or collectively acted in a manner inconsistent with and/or contrary to the interests of the liquidation and in doing so, had placed the primary assets of the company at risk and/or in jeopardy, that due to the personal conflict between the joint liquidators and their inability and/or unwillingness to work together and/or to put aside their differences and mistrust for each other, the liquidation of H the respondent company had been rendered dysfunctional and that the joint liquidators had either individually and/or collectively failed to faithfully discharge their statutory duties as liquidators and had failed to display a reasonable amount of skill and diligence in conducting the affairs of the company. The High Court, however, dismissed the appellant's application to I remove the joint liquidators. Hence, this appeal. The appellant submitted, *inter alia,* that the trial judge had erred in law/or in fact in failing to hold that

the joint liquidators were no longer fit to continue acting as liquidators of the company and there was a complete loss of confidence by the creditors and contributories in their ability to act in the best interest of the liquidation.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) Section 482 of the Companies Act 2016 is similar to s. 232(1) of the Companies Act 1965 in relation to the removal of liquidators. A liquidator, whether in the case of a voluntary or compulsory winding up, may only be removed on 'cause shown', if there is a dispute on the issue. The threshold to justify 'cause shown' is not high but there must be clear evidence justifying the removal. The phrase 'cause shown' is generic in nature and will include the following: (i) some unfitness of the person; (ii) there must be some justifiable reason for the removal; (iii) he has not properly exercised his discretion; and (iv) had placed themselves in the position of conflict of interest such as to rob them of the real and apparent independence necessary for the conduct of a proper winding-up. (paras 12-14)

(2) It was not in dispute that there were many grievances against the first liquidator Ricky Thong and an application to remove him as early as the year 2011 was not successful. Lee Swee Seng J, *in lieu* of removing Ricky Thong, had ordered the appointment of another person by the name of Narenda Kumar Jasani, to be joint liquidators. There were two main points pronounced by Lee Swee Seng J in the grounds of judgment (i) to act jointly and (ii) to seek directions from the court for any matters arising. Liquidators by virtue of r. 63 of the Companies (Winding-up) Rules 1972 are officers of the court. They are professionals as well as per the court order, meticulously required to follow orders as well as directions of the court, failing which it would be nothing short of contempt and may also lead to a suit for professional negligence against the liquidators to indemnify all losses and damages arising from their misconduct (art. 126 of the Federal Constitution). In addition, it is well-settled that joint liquidators must act jointly. This was not the case here. (paras 2-7)

(3) From the evidence before the court, it was clear that the liquidators had breached the orders made by Lee Swee Seng J. The brief grounds stated in the notice of motion was supported by evidence to allow Prayer 1 to 3. Further, the joint liquidators had not taken any reasonable steps to complete the liquidation process in an orderly manner as per the strict orders of Lee Swee Seng J. In addition, there was sufficient evidence to support the proposition of the appellant that the joint liquidators had consistently acted in a dysfunctional manner failing to protect the primary assets of the company. Hence, this court allowed the appeal for

A the removal of the liquidators, and that the official receiver be appointed as liquidator to take conduct of the liquidation process from the date of the pronouncement of this order. (paras 21 & 22)

Bahasa Malaysia *Headnotes*

B Ini adalah rayuan perayu/pencelah ('perayu') terhadap keputusan Mahkamah Tinggi yang telah menolak permohonan penyingkiran pelikuidasi. Permohonan dalam notis di Mahkamah Tinggi, antara lain, adalah (i) Ricky Thong Yew Fook ('Ricky Thong') salah seorang pelikuidasi bersama Shencourt Properties (In Liquidation), syarikat responden C ('syarikat'), disingkirkan sebagai pelikuidasi pertama menurut s. 482(b) Akta Syarikat 2016 ('Akta Syarikat'); (ii) Dato Narendra Kumar Jasani ('Dato Narendra') salah seorang pelikuidasi bersama syarikat disingkirkan sebagai pelikuidasi bersama syarikat menurut s. 482(b) Akta Syarikat; dan (iii) bahawa pegawai penerima dilantik sebagai pelikuidasi syarikat untuk menggantikan Ricky Thong dan Dato Narendra tersebut. Alasan ringkas D untuk penyingkiran adalah, antara lain, bahawa pelikuidasi bersama telah secara individu dan/atau bersesama bertindak dengan cara yang tidak konsisten dengan/atau bertentangan dengan kepentingan likuidasi dan dalam berbuat demikian, telah meletakkan aset utama syarikat responden dalam keadaan berisiko dan/atau dalam keadaan bahaya, bahawa akibat konflik E peribadi antara kedua-dua pelikuidasi bersama dan ketidakupayaan dan/atau keengganan mereka dan/atau untuk mengetepikan perbezaan dan ketidakpercayaan mereka antara satu sama lain, likuidasi syarikat responden menjadi tidak berfungsi dan bahawa pelikuidasi bersama telah, sama ada secara individu dan/atau bersesama, gagal untuk melaksanakan tugas F statutori mereka sebagai pelikuidasi dan telah gagal memaparkan jumlah kemahiran dan ketekunan yang munasabah dalam mengendalikan hal ehwal syarikat. Mahkamah Tinggi, walau bagaimanapun, menolak permohonan perayu untuk menyingkirkan pelikuidasi bersama. Oleh itu, rayuan ini. Perayu menghujahkan, antara lain, bahawa hakim bicara terkhilaf dari segi G undang-undang/atau fakta dalam kegagalannya memutuskan bahawa pelikuidasi bersama tidak lagi sesuai untuk terus bertindak sebagai pelikuidasi-pelikuidasi syarikat responden dan bahawa terdapat hilang keyakinan sepenuhnya oleh pemiutang-pemiutang dan penyumbang-penyumbang dalam keupayaan mereka bertindak demi kepentingan likuidasi.

H

Diputuskan (membenarkan rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 482 Akta Syarikat 2016 adalah sama dengan s. 232(1) Akta I Syarikat 1965 berhubungan penyingkiran pelikuidasi. Seorang pelikuidasi sama ada dalam kes penggulungan sukarela atau wajib hanya boleh disingkirkan atas 'sebab ditunjukkan', jika terdapat pertikaian berkenaan isu itu. Ambang menjustifikasikan 'sebab ditunjukkan'

bukanlah tinggi tetapi harus terdapat keterangan jelas menjustifikasikan penyingkiran. Frasa 'sebab ditunjukkan' bersifat generik dan termasuk yang berikutnya: (i) ketidaksesuaian seseorang; (ii) mesti terdapat alasan yang boleh dijustifikasikan untuk penyingkiran; (iii) tidak melaksanakan budi bicaranya dengan betul; dan (iv) telah meletakkan diri mereka sendiri dalam keadaan konflik kepentingan sehingga menafikan kebebasan sebenar dan jelas yang diperlukan untuk pengendalian penggulungan yang betul.

(2) Tidak dipertikaikan bahawa terdapat beberapa rungutan terhadap pelikuidasi pertama Ricky Thong dan satu permohonan untuk menyingkirnya telah dibuat seawal tahun 2011 tetapi tidak berjaya. Lee Swee Seng H, sebagai ganti menyingkirkan Ricky Thong, telah memerintahkan pelantikan seorang lagi bernama Narenda Jumar Jasani, sebagai pelikuidasi bersama. Terdapat dua perkara utama yang dinyatakan oleh Lee Swee Seng H dalam alasan penghakimannya (i) untuk bertindak bersama; dan (ii) untuk memohon arahan daripada mahkamah untuk apa-apa perkara yang timbul. Pelikuidasi-pelikuidasi melalui k. 63 Kaedah-Kaedah (Penggulungan) Syarikat 1972 adalah pegawai mahkamah. Mereka adalah ahli profesional dan mengikut perintah mahkamah, mereka perlu mematuhi perintah serta arahan mahkamah, dan jika gagal berbuat demikian, adalah dikatakan menghina mahkamah dan mungkin membawa kepada satu guaman kecuaian profesional terhadap pelikuidasi-pelikuidasi untuk menanggung rugi semua kehilangan dan kerugian yang timbul daripada salah laku (per. 126 Perlembagaan Persekutuan). Tambahan lagi, adalah matan bahawa pelikuidasi bersesama harus bertindak bersama. Ini tidak berlaku di sini.

(3) Berdasarkan keterangan di mahkamah, jelas bahawa pelikuidasi-pelikuidasi telah melanggar perintah yang dibuat Lee Swee Seng H. Alasan-alasan ringkas yang dinyatakan dalam notis usul disokong oleh keterangan membenarkan Permohonan 1 hingga 3. Seterusnya, pelikuidasi bersama tidak mengambil apa-apa langkah munasabah untuk menyelesaikan proses likuidasi dengan teratur mengikut perintah-perintah Lee Swee Seng H. Tambahan lagi, terdapat keterangan mencukupi untuk menyokong cadangan perayu bahawa pelikuidasi bersama secara konsisten bertindak secara tidak berfungsi dan gagal melindungi aset-aset utama syarikat. Oleh itu, mahkamah ini membenarkan rayuan untuk menyingkirkan pelikuidasi-pelikuidasi, dan agar satu pegawai penerima dilantik sebagai pelikuidasi untuk menjalankan proses likuidasi dari tarikh pengumuman perintah ini.

Case(s) referred to:

Adam Eytan Ltd., Ex parte Charlesworth [1887] 36 Ch D 299 ***(refd)***
Bina Puri Sdn Bhd v. Jambulingam Sethuraman-Raki c/o Rimbun Corporate Advisory Sdn Bhd [2011] 1 LNS 1345 HC ***(refd)***
Dina Nath v. BL Sharma and Ors [1979] 49 Comp Cas 364 ***(refd)***
Hew Kiang Hoe & Anor v. Shencourt Properties Sdn Bhd [2011] 7 CLJ 158 HC ***(refd)***
Hong Investment Pte Ltd v. Thai Thong Hung Plastics Industries (Pte) Ltd [2010] SGHC 375 ***(refd)***
Janice Wilby v. Ian Ribgy [2015] EWHC 2394 ***(refd)***
Papua New Guinea Block Co. Pty Ltd. In. re, [1980-1984] LRC (Comm) 676 ***(refd)***
Re Charterland Gold Fields Ltd. [1909] 26 TLR 132
Re Karamelli Burnet Ltd [1971] 1 Ch 203 ***(refd)***
Re Keypak Homecare Ltd (1987) BCLC 409 ***(refd)***
Re Rubber & Produce Investment Trust [1915] 1 Ch 382 ***(refd)***
Re Sir John Moore Gold Mining Co (1879) 12 Ch D 325 ***(refd)***
Re Tai Sun Plastic Novelties Ltd [2006] HKCU 1316 ***(refd)***
Re Ve Interactive Ltd (in administration) [2018] EWHC 186 ***(refd)***
TR Hamzah & Yeang Sdn Bhd v. City Centre Sdn Bhd [2011] 1 LNS 1221 HC ***(refd)***

Legislation referred to:

Companies Act 2016, s. 482(b)
Companies Act 1965 (since repealed), s. 232(1)
Companies (Winding-up) Rules 1972, r. 63
Federal Constitution, art. 126
The Constitution of India [Ind], arts. 125, 129

For the appellant - Alvin Tang & Natasha Louis; M/s Bodipalar Ponnudurai De Silva
For the petitioner - David Mathews; M/s Mathews Hun Lachimanan
For the respondent - Harpal Singh Grewal, Terrance Kanagaratnam, Collin Gooting & Archana Nair; M/s Kassim Tadin Wai & Co
Official Receiver - Norina Zainol Abidin; SFC & Nur Faizah Abdul Sani; FC

[Editor's note: For the High Court judgment, please see Hew Kiang Hoe & Anor v. Shencourt Properties Sdn Bhd [2011] 7 CLJ 158 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/intervener appeals against the decision of the High Court which had refused the application for the removal of joint liquidator.

[2] It is not in dispute that there were many grievances against the first liquidator, Ricky Thong and an application to remove him as early as the year 2011, was not successful. His Lordship Lee Swee Seng J, *in lieu* of removing Ricky Thong ordered the appointment of another person by the name of Narendra Kumar Jasani, to be joint liquidator. The judgment of the learned judge is reported as *Hew Kiang Hoe & Anor v. Shencourt Properties Sdn*

Bhd [2011] 7 CLJ 158, and sets out the jurisprudence for the removal of the liquidator. This judgment must be read together with the previous judgment, as well as the judgment under appeal to appreciate our grounds in the proper perspective.

[3] It is important to note that Lee Swee Seng J had specifically pronounced in the grounds of judgment as follows:

> **Pronouncement**
>
> Having regard to all the above consideration, justice of this case would have been served by appointing an additional Liquidator to act together with the current Liquidator. The Court thus appointed Narenda Kumar of Grand Thornton as the joint liquidator with Ricky Thong Yew Fook from 26 April 2011.
>
> The appointment is subject always to a single Liquidator's fees and subject to directions under s. 232(7) of the Companies Act which this Court shall give when both Liquidators appear before the Court on a next mention date fixed.
>
> The court also takes into consideration that this will least impede whatever further instructions might be necessary for the preparation to oppose the appeal being fixed on 18 May 2011 and subsequent further appeals if any. I also ordered costs of RM8,000 is to be paid by current Liquidator personally to the Petitioners.
>
> **Postscript**
>
> This Court has fixed 24 May 2011 as the next mention date for the Liquidators to brief the Court on the progress in the appeal to the Court of Appeal and the challenges they may face in moving forward. The Petitioners' solicitors and the supporting Creditors' solicitors as well as the Contributory solicitors have been notified of the mention date too. Whilst past relationships between the Liquidators and the Creditors have been characterised more by mistrust and suspicion, it is hoped that this and subsequent mention dates fixed as parties move along their timeline would allow the Liquidators to touch base with the various stakeholders. As and when they have found enough momentum and established the human dynamics to go on their own steam and having open channels of communication with one another, this Court would then recede into the background.
>
> The Court's door remains, as always, open to any party who would knock on it, to seek directions on any matter that may arise in the course of liquidation as envisaged in s. 236(1) and 236(3) of the Companies Act. Parties may not always see eye-to-eye on every issue that may arise, but they are encouraged to look in the same direction together.
>
> Dated: 23 May 2011.

[4] There are two main points in the pronouncement referred to the above. One is to act jointly and the other to seek directions from the court for any matters arising.

[5] As a general rule, wilful disobedience to any judgment or order, direction or any other process of court, etc. may amount to contempt.

[6] It must be emphasised here that liquidators by virtue of r. 63 of the Companies (Winding-up) Rules 1972 are officers of the court. They are professionals as well as per the court order, meticulously required to follow orders as well as directions of the court, failing which it will be nothing short of contempt and may also lead to a suit for professional negligence against the liquidators to indemnify all losses and damages arising from their misconduct. (See art. 126 of the Federal Constitution; Indian Constitution – arts. 125 and 129).

[7] In addition, it is well-settled that joint liquidators must act jointly. This was not the case here. (See *Dina Nath v. B.L. Sharma and Ors* [1979] 49 Comp Cas 364 (Delhi)). In this time and era, the court must ensure that a liquidation of the company should be undertaken by committed liquidator. Delay in liquidation is a serious issue which cannot be brushed off by the courts at all stages.

Notice Of Motion

[8] The prayer in the notice of motion before the High Court *inter alia* read as follows:

1. That Ricky Thong Yew Fook of Messrs Thong & Associates, one of the Joint Liquidators of Shencourt Properties (In Liquidation), the abovenamed Respondent Company, be forthwith removed as Joint Liquidator of the Respondent Company on such terms and upon such directions deemed fit and appropriate pursuant to Section 482(b) of the Companies Act 2016 and/or the inherent jurisdiction of this Honourable Court;

2. That Dato Narendra Kumar Jasani a/1 Chunilai Rugnath of Messrs Grant Thornton Consulting Sdn Bhd, one of the Joint Liquidators of Shencourt Properties (In Liquidation), the abovenamed Respondent Company, be forthwith removed as Joint Liquidator of the Respondent Company on such terms and upon such directions deemed fit and appropriate pursuant to Section 482(b) of the Companies Act 2016 and/or the inherent jurisdiction of this Honourable Court;

3. That the Official Receiver be appointed as Liquidator of Shencourt Properties (In Liquidation), the abovenamed Respondent Company, in place of the said Ricky Thong Yew Fook and Dato Narendra Kumar Jasani a/1 Chunilai Rugnath;

4. An order that the letter dated 17.5.2017 from Messrs Kassim Tadin, Wai & Co purporting to reject the Intervener's (Shencourt Sdn Bhd) proof of debt dated 19.4.2017 on behalf of the said Ricky Thong Yew Fook, is defective, invalid, null and void;

5. n order that the following meetings convened unilaterally by the said Ricky Thong Yew Fook and any resolution passed thereat is invalid, null and void:

   (a) the purported creditors meeting of Shencourt Properties (In Liquidation), the abovenamed Respondent Company held on 22.5.2017 at 11 a.m.; and

   (b) the purported contributories meeting of Shencourt Properties (In Liquidation), the abovenamed Respondent Company held on 22.5.2017 at 4 p.m.

6. Suitable provision be made for the cost of and incidental to this application to be paid out of the assets of the Respondent Company; and

7. Such further or other relief deemed fit and appropriate by this Honourable Court.

[9] The brief grounds for removal read as follows:

   (a) the Joint Liquidators have either individually and/or collectively acted in a manner inconsistent with and/or contrary to the interests of the liquidation and in doing so, have placed the primary assets of the Respondent Company at risk and/or in jeopardy;

   (b) due to the personal conflict between the Joint Liquidators and their inability and/or unwillingness to work together and/or to put aside their differences and mistrust for each other, the liquidation of the Respondent Company has been rendered dysfunctional;

   (c) the Joint Liquidators have either individually and/or collectively failed to faithfully discharge their statutory duties as liquidators and have failed to display a reasonable amount of skill and diligence in conducting the affairs of the company;

   (d) there is a complete loss of confidence in the ability of the Joint Liquidators to act in the best interests of the liquidation and/ or for the benefit of the creditors and/or contributories of the Respondent Company;

   (e) It would not be in the interests of the liquidation and/or creditors and or contributories of the Respondent Company for the Joint Liquidators individually and/or collectively to remain in office any longer.

[10] The learned High Court Judge's reasons for dismissal as well as some directions on the notice of motion has been summarised in a rudimentary manner and placed before us. To save judicial time, we repeat the said summary which reads as follows:

1. The defendant/respondent/D1 had been wound up since 2002. In 2004, the court had appointed Ricky as the liquidator in replacing the Official Receiver. In 2011, the court dismissed a similar application to remove Ricky as the liquidator and the court appointed Jasani as co-liquidator.

2. The intervener/appellant/IV is one of the creditor that made an application to remove Ricky and Jasani as the liquidators and to re-appoint Official Receiver as the liquidator. IV also prayed for declaration that a letter dated 17.5.2017 of D1's solicitor in rejecting the proof of debt to be defective and void. IV further prayed for the meeting held on 22.5.2017 to be void.

3. IV claimed that; IV is the creditor of RM6,255,789.83 of D1 and the largest contributor of D1. This application is supported by other creditors and contributors from Chai Family. Other creditors are Lim Chon Hok that supports the removal of Ricky and Orient Retail Outlet supports the removal of Jasani.

4. After the appointment of both liquidators, there is no progress to the liquidation stage of D1. Both liquidators are inconsistent and had put the assets of D1 at risks. There is personal conflict between the liquidators that made liquidation process to be stalled. The creditors lose confidence in both liquidators in dealing with the assets.

5. The dealing of 18 lands in Mukim Petaling was done by Ricky to sell the lands to JVC Connection/JVC for 27 million which is below the market price. JVC deposited a non-refundable deposit to Ricky for RM54,000.00 with Option Agreement. Ricky then terminated the Option Agreement with JVC and entered into another SPA with Dynamic Auro for RM35 million. JVC then proceeded with Specific Performance against D1 for the sales of the lands. In the end, D1's assets is going to bear the costs of litigation deriving from the liquidator's action. Both liquidators cannot co-operate with each other and they even filed a separate defence to the suit. Both liquidators then filed applications to remove each other as joint liquidator.

6. D1 stated that; IV involved in illegal transaction post-winding up for receiving the sale of D1's assets to Liberty Pillar. Liberty Pillar was owned by Chai Family and the shareholders of IV were also the shareholders of Liberty Pillar. The transaction was then declared as void by the court. IV comes to the court with unclean hands. D1 is in the midst of finalising the listing of creditors to be distributed to contributors and creditors. The Option Sale with JVC was made in 2010 at the market price which Jasani also made same valuation of the lands in 2011 for about RM30 million.

7. High Court: IV's application to remove joint liquidator is partly dismissed and partly not given any order thereto. The court gave further order that the Joint Liquidators to file in a report of the status of the liquidation and to carry out a proof of debt process.

[11] The memorandum of appeal reads as follows:

1. The learned Judge erred in law and/or in fact in dismissing the Appellant's Notice of Motion dated 30.10.2017 ("the Motion") to:

1.1 remove Ricky Thong Yew Fook ("Ricky Thong") and Dato' Narendra Kumar Jasani a/1 Chunilai Rugnath ("Dato' Jasani"), the Joint Liquidators of Shencourt Properties Sdn Bhd (Company No: 245996-T) (In Liquidation);

1.2 appoint the Official Receiver as the liquidator of Shencourt Properties Sdn Bhd; and

1.3 nullify the purported rejection of the Appellant's proof of debt dated 19.4.2017 *vide* letter dated 17.5.2017 from Messrs Kassim Tadin, Wai & Co ("the KTW Letter").

2. The learned Judge erred in law and/or in fact in failing to hold that the Joint Liquidators are no longer fit to continue acting as liquidator of the Respondent ("the Company") and there is a complete loss of confidence by the creditors and contributories in their ability to act in the best interest of the liquidation.

3. The learned Judge erred in law and/or in fact in failing to hold that the Joint Liquidators have misconducted themselves in dealing with the assets of the Company and placed the primary asset of the Company at risk (namely 18 pieces of land in Mukim of Petaling District of Kuala Lumpur ("the Lands")). In this connection, the learned Judge failed to appreciate that:

3.1 Ricky Thong wrongfully entered into an Option Agreement dated 27.9.2010 with JVC Connection Sdn Bhd ("JVC") granting an irrevocable option to JVC to purchase the said Lands at the gross undervalue of RM27million ("the Option Agreement"). The Option Agreement was wrongfully executed by Ricky Thong without:

(a) ascertaining the true and actual market value of the said Lands;

(b) ascertaining the extent of the Company's liabilities and/or creditor claims; and

(c) obtaining the mandate of the creditors and contributories and/or the sanction of the winding court for the disposal of the said Lands.

3.2 The true and actual market value of the said Lands at the material time was in excess of RM90million, as affirmed by Dato' Jasani, one of the Joint Liquidators;

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3.3 The Joint Liquidators have admitted that the entry of the Option Agreement was detrimental to the Company, having affirmed on oath that the Option Agreement was "manifestly unfair and prejudicial to the interest of the Company and its creditors and contributories;

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3.4 Dato' Jasani being one of the Joint Liquidators, confirmed on oath that Ricky Thong was negligent in entering the Option Agreement by:

(a) failing to conduct a proper valuation of the said Lands;

(b) failing to seek court's sanction for the sale of the said Lands and/or the grant of an irrevocable option to JVC; and

C

(c) failing to subject the purchase price of the said Lands to adjustments.

3.5 The Joint Liquidators subjected the said Lands to a real risk of being forfeited by the government by failing and/or refusing to pay the quit rent levied on the said Lands and/or refusing to bring this issue to the attention of the creditors and contributories.

D

3.6 The Company derived no benefit from the execution of the Option Agreement as the Company was not entitled to use any part of the option fee paid under such agreement.

E

4. The learned Judge misdirected herself in law and/or in fact in failing to hold that the purchase consideration of RM27 million stated in the Option Agreement is at a gross undervalue. In this connection, the learned Judge failed to appreciate that Dato' Jasani, one of the Company's liquidators had affirmed on oath that he had received offers to purchase the said Lands for a sum of approximately RM90 miIlion.

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5. The learned Judge erred in law and/or in fact in failing to hold that the Joint Liquidators misconducted themselves and/or breached their duty of care in filing an application to compromise a suit brought by JVC for specific performance of the Option Agreement ("the JVC Suit") for a sum of RM30 million ("the Compromise Application").

G

6. The learned Judge failed to appreciate that the Joint Liquidators cannot be entrusted with the proper liquidation of the Company since they have shown a propensity to be dishonest with the valuation of the said Lands and/or the ascertainment of the total liabilities of the Company.

H

7. The learned Judge erred in law and/or in fact in failing to hold that the Joint Liquidators have falsely affirmed on oath that RM30 million was sufficient to settle the claims of all the creditors of the Company. The learned Judge failed to appreciate that such averment was false because:

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7.1 The Joint Liquidators had not carried out a proof of debt exercise to ascertain the total claims of all the creditors and was therefore not in a position to determine the actual liability and/or indebtedness of the Company. Further, the contributories have indicated that the Company's total liabilities exceed RM30 million; and

7.2 Dato' Jasani has previously affirmed on oath to the contrary, that the Company would suffer substantial loss if the Option Agreement was performed and further that the purchase consideration of RM27 million would not satisfy the winding up expenses and creditors' claims.

8. The learned Judge erred in law and/or in fact in failing to hold the Joint Liquidators have failed to act in the best interest and/or protect the interest of the Company in defending the JVC Suit. In this connection, the learned Judge failed to appreciate that although the Joint Liquidators were required in law to act jointly on behalf of the Company, both the Joint Liquidators acted separately and to the exclusion of each other in proceedings related to the JVC Suit which resulted in:

8.1 Leave of the winding up court being granted for the filing of the JVC Suit;

8.2 Judgment in default of defence ("JIDD") being entered against the Company;

8.3 Numerous appeals being lodged to the Court of Appeal and Federal Court arising from the entry of JIDD ("the Appeals"); and

8.4 Unnecessary and exorbitant legal costs being incurred for the conduct of the Appeals by no less than three sets of Counsel to represent the differing interest of each of the Joint Liquidators.

9. The learned Judge erred in law and/or in fact in failing to appreciate that the Joint Liquidators are unfit to continue representing the Company in defending the JVC Suit because they are in a position of conflict. In this connection the learned Judge failed to appreciate that the Joint Liquidators can no longer act impartially to protect the interests of the creditors and/or contributories because:

9.1 the Joint Liquidators showed a disinterest in properly defending the JVC Suit when they filed the Compromise Application despite having affirmed on oath that the performance of the Option Agreement was manifestly unfair to the creditors and/or contributories;

9.2 Ricky Thong would be unable to act impartially to defend the JVC Suit since one of the primary defences of the Company relates to his wrongful and/or negligent acts of entering into the Option Agreement. In the circumstances, Ricky Thong's personal interests conflicts with the best interest of the Company;

9.3 The entry of judgment against the Company in the JVC Suit benefits the Joint Liquidators because the Joint Liquidators contends that the entry of judgment in the JVC Suit validates their actions and/or vindicates their wrongdoing in respect of the Option Agreement; and

A 9.4 In the circumstances, there is a complete loss of confidence in the Joint Liquidators' ability to protect the Company's interest in the JVC Suit especially since judgment has now been entered after full Trial.

10. The learned Judge erred in law and/or in fact in failing to hold that the liquidation of the Company has been rendered dysfunctional as the Joint Liquidators have at various stages of the liquidation acted independently and to the exclusion of each other. In this connection the learned Judge failed to appreciate that:

10.1 Ricky Thong filed an application to have sole conduct of the JVC Suit where both the Joint Liquidators have independently confirmed that they are unable to work together and further that the liquidation of the Company has been in a state of conflict;

10.2 The Joint Liquidators filed cross applications to remove each other as liquidators of the Company and in those applications, the Joint Liquidators confirmed that they are unable to agree on the manner in which the liquidation is to be carried out and raised grave and serious allegations against each other:

10.2.1 Ricky Thong contended that Dato' Jasani *inter alia*:

(a) failed and/or was negligent in carrying out is duties as Joint Liquidator;

(b) made false statements under oath; and

(c) failed to protect the said Lands.

10.2.2 Dato' Jasani contended that Ricky Thong *inter alia*:

(a) committed contempt of court in respect of the liquidation of the Company;

(b) is not fit a and proper person to act as Joint Liquidator; and

(c) intends to undermine the interests of the creditors and contributories.

10.3 Ricky Thong unilaterally convened a creditors' and contributories meetings of the Company without the authority and consent of Dato' Jasani, with the intention to garner support to have Dato' Jasani removed as a co-liquidator; and

10.4 Dato' Jasani commenced committal proceedings against Ricky Thong for matters arising in the liquidation of the Company.

11. The learned Judge erred in law and/or in fact in failing to hold that the Joint Liquidators have failed to advance the liquidation of the Company despite the Company being wound up 16 years ago. In this connection, the learned Judge failed to appreciate that at the time of this application, no proof of debt exercise or realisation of assets had yet been carried out by the Joint Liquidators and therefore the liquidation was still at an early stage.

12. The learned Judge erred in law and/or in fact in failing to order that the KTW Letter is defective, invalid, null and void because it does not amount to a proper rejection of the proof of debt as required by the winding up rules despite having made a finding to that effect.

13. The learned Judge erred in law and/or in fact in failing to hold that the purported rejection of the Appellant's proof of debt is defective, invalid and/or null and void for non-compliance with Rules 92 and 98 of the Winding-up Rules 1972 and because of it was issued without the authority and consent of Dato' Jasani, the other Joint Liquidator.

14. The learned Judge erred in law and/or in fact when she found that the appointment of the Official Receiver was not practical and may lead to complications. In this regard, the learned Judge failed to appreciate that:

14.1 The conduct of the Joint Liquidators over the JVC suit has been in shambles and therefore it is imperative that a neutral party be appointed to take over conduct of the suit;

14.2 The liquidation of the Company is still at an early stage;

14.3 The Official Receiver had no objections to its appointment as liquidator of the Company; and

14.4 The interests of the liquidation can only be served by the removal of the Joint Liquidators.

15. The learned Judge failed to appreciate that the Appellant's rights as a substantial creditor and contributory have been disregarded and ignored by the Joint Liquidators.

Jurisprudence Related To s. 482(b) CA 2016 And/Or Inherent Jurisdiction For Removal

[12] Section 482 of Companies Act 2016 is similar to s. 232(1) of Companies Act 1965 in relation to removal of liquidator. The said section read as follows:

Resignation or removal of liquidator in winding up by Court

482. A liquidator or interim liquidator appointed by the Court may:

(a) resign from office in accordance with the rules; or

(b) on cause shown, be removed from office by the Court.

[13] It is now well-established in all common law jurisdiction where the corporate jurisprudence is similar to ours that a liquidator whether in case of voluntary or compulsory winding up may only be removed on 'cause shown', if there is a dispute on the issue.

[14] The threshold to satisfy 'cause shown' is not high but there must be a clear evidence justifying the removal. The phrase 'cause shown' is generic in nature and will include the following: (a) some unfitness of the person; (b) there must be some justifiable reason for the removal; (c) he has not properly exercised his discretion; (d) have placed themselves in the position of conflict of interest such as to rob them of the real and apparent independence necessary for the conduct of a proper winding-up. (See *Papua New Guinea Block Co. Pty Ltd. In. re,* [1980-1984] LRC (Comm) 676; *Re Sir John Moore Gold Mining Co.* (1879) 12 Ch D 325; *Re Keypak Homecare Ltd.* (1987) BCLC 409 (Ch D); *Hong Investment Pte Ltd v. Thai Thong Hung Plastics Industries (Pte) Ltd* [2010] SGHC 375).

[15] Courts have gone to the extent of saying there need not be personal misconduct or unfitness. (See *Adam Eytan Ltd., Ex parte Charlesworth* [1887] 36 Ch. D 299; *Re Charterland Gold Fields Ltd.* [1909] 26 TLR 132; *Re Karamelli Burnet Ltd.* [1971] 1 Ch 203).

[16] Courts have also held that where a liquidator disregards the wishes of creditors in an insolvent company and the wishes of the contributories in a solvent company, it may be sufficient cause on which the court may act in removing a liquidator. (See *Re Rubber & Produce Investment Trust* [1915] 1 Ch 382).

[17] One must not lose sight that the liquidator is not a new species under a statutory corporate regime. Before that, such category of persons were referred to as receivers and managers. (See *Tee Siew Kai v. Machang Indah Development Sdn Bhd* (P-02(IM)-843-04-2017)).

[18] In *TR Hamzah & Yeang Sdn Bhd v. City Centre Sdn Bhd* [2011] 1 LNS 1221; [2012] 1 MLJ 383, Hamid Sultan J had dealt with the jurisprudence related to the removal of liquidator pursuant to s. 232(1) in great detail. On the facts of the case, the court *inter alia* held:

> (1) The court is obliged to remove the liquidator *in limine* if he has failed to act within the spirit and intent of the several provisions of the Companies Act 1965 and more importantly when he acted outside the scope of his appointment or order of court or failed to protect the interest of the creditors and/or contributories or was not justly, expeditiously and economically pursuing to conclude the liquidation process as it must not be forgotten that he is an officer of court and his acts or omission must not place the administration of justice to disrepute (see para 15(1)).
>
> (2) In the instant case, the liquidator had not, *inter alia*, diligently acted on the security requirement, failed to obtain the sanction of the creditors and/or contributories, omitted to exercise his statutory duties, failed to seek appropriate directions from the court for just,

expeditious and economical disposal of the liquidation process, notwithstanding the winding up order was made some ten years ago and substantial assets worth about quarter billion had not been satisfactorily dealt with (see para 15(m)).

(3) Very importantly, the liquidator in the instant case being an officer of court was in gross contempt and/or disrespect to the order of court when he proceeded to act in the liquidation process in the absence of committee of inspection. In doing so he had exposed himself to personal liability and he may not only be liable to the creditors and/or contributories but also to other service providers whom he had appointed and now will not be able to be indemnified from the assets of the respondent company as the protective sections in ss. 232(8), 268(1) of Companies Act 1965 etc. may not apply if the act done was in breach of a court order. Regrettably, Chuah by not complying with the court order may have placed his position equivalent to a tortfeasor and/or *de son tort* (see para 15(m)).

(4) In addition, such contempt must be taken cognizance by the official receiver and appropriate investigation of the liquidation process must be made and informed to the relevant Ministry which gave license to the liquidator to take necessary action. Contempt of court order by liquidator who is an officer of court must be severely dealt with and the relevant authorities and/or creditors and/or contributories must act to arrest such conduct *in limine*.

[19] In *Bina Puri Sdn Bhd v. Jambulingam Sethuraman-Raki (c/o Rimbun Corporate Advisory Sdn Bhd)* [2011] 1 LNS 1345, the court asserted that:

(3) In the instant case the liquidator had voluntarily accepted to take conduct of the liquidation process for remuneration and in consequence he was expected to act professionally for just, expeditious and economical disposal of the liquidation process. He could not accept the office and then complain that there were no funds to proceed expeditiously. He ought to have submitted to the court for direction if funds were lacking. As such, it was found that the respondent had not kept up to the professional standard expected of him. As such the applicant's complaint for the respondent's removal had merits (see para 10).

(4) In the circumstances the official receiver was appointed as liquidator to take conduct of the liquidation process and the respondent was directed to hand over all relevant files, documents, monies etc. in respect of the liquidation to the official receiver (see para 12(b)).

[20] It will also appear that the threshold to remove the joint liquidator who do not act as per the court's order and/or conflicts between them and inability to work together, is lower when contrasted with the removal of single liquidator. Support for the proposition is found in a number of cases. To name a few they are as follows:

(i) In *Dina Nath v. B.L. Sharma and Ors* [1979] 49 Comp Cas 364 (Delhi), the court observed:

> 1. ... I may mention that, during the pendency of this petition, both the joint liquidators have been removed because of the fact that they were at loggerheads and unable to function jointly and have been substituted by the official liquidator ...
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> 5. The next complaint is that the first respondent as joint liquidator realised a sum of Rs. 88,637.4 1and distorted Rs. 88,623.03 without the consent and connivance *(sic)* of respondent No. 4. It is said that respondent No. 1 and respondent No. 4 had to act jointly and, by acting alone, R-1 was guilty of act of misfeasance. There is no doubt that the joint liquidators had to act jointly, but the mere fact that one of them has acted can only constitute an act of misfeasance or breach of trust, etc., if it is shown that the company has suffered any loss. ..I have no doubt from an analysis of the respondent that there has been some irregularity in the functioning of the first respondent ...
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> 7. As the company had gone into liquidation, no doubt the office of the company could not be given up unless both the joint liquidators had worked together. As I have already explained, the conflict between the two liquidators was that one claims that he was to act alone and the other had been removed per resolution of the creditors, each of the liquidators started acting on his own ...

(ii) In *Hong Investment Pte Ltd v. Thai Thong Hung Plastics Industries (Pte) Ltd* [2010] SGHC 375, on the facts of the case, the court found that the joint liquidators' dissatisfaction and/or discontentment with each other was an unsatisfactory attitude towards their obligations as liquidators, and proceeded to remove and replace both joint liquidators.

(iii) In *Janice Wilby v. Ian Ribgy* [2015] EWHC 2394 (Ch), the court in relation to joint executors, also recognised that where there was a complete breakdown of relationship and the joint executors were unable to function jointly. In consequence, both joint executors had to be removed. The court made the following observation:

> 19. I am entirely satisfied in the present case that there has been a complete breakdown between the two appointed executors. There is a clash of personalities and a lack of confidence in Mr Rigby by Mrs Wilby and in Mrs Wilby by Mr Rigby ... What is clear, however, is that the two siblings do not pet on and cannot work together. That is evidenced by the fact that three years on, there has been no progress of any concrete sort in the administration of their late mother's estate.

> 20. ... The fact is that the two have no trust in each other, and I am satisfied that they cannot work together ...
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> 21. I am entirely satisfied that it is appropriate to remove both Mr Rigby and Mrs Wilby as executors of the will since neither has any confidence in the other and they cannot work together ...

(iv) In *Re Ve Interactive Ltd (in administration)* [2018] EWHC 186 (Ch), in relation to administrators, the court observed:

> 30. ... It was in the interests of the Company to identify whether claims exist which might replenish its estate including claims against the Respondents. That was the interest of the Respondents, as administrators ...
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> 31. The Respondents' failure to approach this matter correctly persuaded me that I should remove them as administrators and not wait until their resignation took effect to appoint replacement administrators.
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> 32. ... I unhesitatingly reach the conclusion from that evidence that the Respondents have lost perspective of their role. Throughout, their evidence demonstrated that they are primarily and essentially concerned with the defence of any claim against S&W and not with the competing, conflicting interests of the Company. The answers and responses of Mr Shinners and Mr Hardman demonstrated that they had and have no adequate appreciation of their conflict.
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> 33. ... However, I should make clear that in my judgment based upon the history of this matter as a whole, it is not that there "may be a perception that... creditors would not have confidence in the continued discharge of their functions relating to those investigations it is that there is no cause for confidence.
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> 34. That means either all or two had to be removed and replaced by an independent party(ies) with the specific role of and sole responsibility for investigation and pursuit of claims ...

(v) In *Re Tai Sun Plastic Novelties Ltd* [2006] HKCU 1316, where the Hong Kong High Court held:

> [26] ... that due cause in this context does not require misconduct or personal unfitness on the part of the liquidator to be established, and that it suffices to show that the liquidator has been too relaxed in his approach to the investigation of the Company's affairs, and that the creditors were justified in losing confidence in his ability to carry on the liquidation effectively. Mr Bartlett submitted that in the circumstances it was clearly reasonable for the Applicant to have lost confidence in Mr Lui, given the manner in which the liquidation had been dealt with to date – in particular; the dilatory manner in which the Applicant's queries were responded to, the failure to properly investigate matters which called for investigation, and the demand for an excessive amount of funding from the Applicant when the Applicant asked for the liquidation to be continued.

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> [27] In my view, each of these matters is made out. While I would accept that Mr Ha and Mr Lui may have been constrained in their actions by a lack of funds, it seems to me that they have fallen short of the standards to be expected of them in the manner in which they have dealt with the Applicant's concerns.

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> [31] In these circumstances, it seems to me that due cause has been shown for the removal of Mr Ha and Mr Lui as liquidators of the Company ...

[21] We have read the appeal records and the able submissions of the parties. After having given much consideration to the submissions of the C respondent, we take the view that this is a fit and proper case to allow the appeal, limited to the prayers 1 to 3 of the notice of motion referred to earlier. Our reasons, *inter alia,* are as follows:

(i) From the evidence before the court, it is clear that the liquidators have breached the orders made by Lee Swee Seng J. The brief grounds stated D in the notice of motion is supported by evidence to allow prayer 1 to 3.

(ii) Further, the joint liquidators have not taken any reasonable steps to complete the liquidation process in an orderly manner as per the strict orders of Lee Swee Seng J. In addition, there are sufficient evidence to E support the proposition of the appellant that the joint liquidators have consistently acted in a dysfunctional manner failing to protect the primary assets of the company.

(iii) The respondent had raised preliminary issues to say that leave of the winding-up court is required to remove the joint liquidators. We do not F think so when the application is anchored under s. 482(b) of CA 2016. This objection was not raised in the court below. In this respect, we agree with the submission of the appellant which read as follows:

> 2.1 S. 482(b), Companies Act 2016 does not impose any leave requirement. This was made clear in *Kao Che Jen v. N Chanthiran Nagappan* [2015] 9 CLJ 295, where the Court of Appeal rejected the G argument that leave of court is required before an application to remove a liquidator is to be made and held:
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> > In the instant action, the removal of the respondent as the company's liquidator and the appointment of the official H receiver in his stead is governed by ss. 232(1) and 266 of the Act which did not make leave as a prerequisite to such removal application. In imposing the requirement for leave under s. 232(1) of the Act, the HCJ misconstrued the section. This would be against the clearly expressed intention of Parliament ...

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> ... Section 232(1) of the Act contains and only contains one relevant requirement so far as it relates to an application for the removal of a liquidator in that the power conferred on the court is exercisable by it only on cause shown by the applicant ...

2.2 The leave requirement under s. 471 Companies Act 2016 is inapplicable because:

(a) the Removal Application only concerns the position of the Joint Liquidators and is not a proceeding commenced against the Company.

(b) leave under this section is only required for matters outside the purview of the winding-up court and cannot be applied towards the Removal Application which is heard by the winding up court. (See *Mesuntung Property Sdn Bhd v. Kimlin Housing Development Sdn Bhd* [2014] 4 MLJ 886).

2.3 The Removal Application is not an application filed under s. 541, Companies Act 2016 (in *pari materia* with s. 305, Companies Act 1965). In this regard, it should be noted that no orders for personal liability or compensation has been sought against the joint liquidators in this application. In *Wong Kee Chong v. Folin & Brothers Sdn Bhd* [2011] 10 CLJ 806, Abdul Aziz Rahim J (as he then was) made this important distinction in holding that no leave is required to remove a liquidator and held:

> Leave for the application was not required under section 232(1) of the companies Act 1965. Cases for removal of liquidators where no leave is required must be distinguished from cases where action is proposed against a liquidator for some alleged wrongdoings in the performance of his official duty as a liquidator ...

2.4 In this connection, all the cases relied upon by the Joint Liquidators are inapplicable as they concern suits filed against the liquidator seeking damage for misfeasance, and are not in respect of an application to remove a liquidator from their office.

[22] For reasons stated above, we allow the appeal for removal of the liquidators, with no order as to costs, with the following consequential order and/or directions:

(i) the official receiver is appointed as liquidator to take conduct of the liquidation process from the date of the pronouncement of this order;

(ii) the liquidators with prior appointment with official receiver to hand over all relevant files, documents, monies etc. in respect of the liquidation to the official receiver in person within 20 working days from the date of this order, failing which the relevant parties may be at liberty to initiate contempt proceedings for non-compliance of this part of the order;

A (iii) the official receiver to notify the solicitors for the appellant and respondent, the supporting creditors, contributories who were involved in this action, to be present when he is receiving the above from the liquidators;

B (iv) the official receiver within three months of the order to compile a report of the status of the liquidation process and the feedback from the creditors and/or contributories in respect of the report with a view for just, expeditious and economical conclusion of the liquidation process; and

C (v) the appellant shall pay in advance a sum requested by the official receiver to meet with immediate disbursements, if any, for the purpose of attending to the liquidation process.

We hereby order so.

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